

Full and Equal Rights of Conscience

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“By superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer.”¹

Thus did Mark DeWolfe Howe – generally renowned for his graciousness – begin his famous series of lectures reviewing the United States Supreme Court’s treatment of the social and intellectual history of church and state. The Court’s decisions since the 1965 publication of *The Garden and the Wilderness* make Howe’s critique seem understated.

Despite a flood of illuminating and directly relevant scholarship about religion in the last decade,² the Supreme Court now has inserted significant

* Professor of Law, Boston College Law School. It is a genuine pleasure to be included in this exceptionally strong symposium. My gratitude at being invited is increased considerably because this helps me to continue my association, at least symbolically, with the extraordinary feeling of ‘*ohana* within the W.S. Richardson School of Law. This engaged group of diverse students, faculty, staff, and alumni also know how to welcome visitors warmly and well, as they did throughout my sabbatical year. They also taught my family and me a great deal about community, for which we are most grateful.

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¹ MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 4 (1965).

² See, e.g., ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* (1990); BETTE NOVIT EVANS, *INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM* (1997); JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1997); THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM (Merrill D. Peterson & Robert C. Vaughan eds., 1988); NANCY ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USE OF PLURALISM IN AMERICA* (1998); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991); Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) [hereinafter *Hamburger, Constitutional Right*]; Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295 (1992) [hereinafter *Hamburger, Equality and Diversity*]; Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Ira C. Lupu, *Where Rights Begin: the Problem of Burden on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1988); Michael

new ahistorical "synthetic strands into the tapestry of American history."³ The interplay of *Employment Division, Department of Human Resources v. Smith*⁴ and *City of Boerne v. Flores*,⁵ for example, suggests a current Court majority that disregards not only history in general, but also in particular, as well as the Court's own precedents and the usual demands of internal consistency.

After a majority of the Justices relegated religious freedom claims to the majoritarian political process in *Smith*, the Court in *Boerne* invalidated one of the clear products of that process – the Religious Freedom Restoration Act, passed after extensive hearings by a nearly-unanimous Congress. The Court acted in the name of abstract versions of separation of powers and federalism. As in other recent opinions about religion, the Court in *Smith* and *Boerne* relied on tub-thumping about its responsibility in guarding constitutional turf, a key component within the Court's proclaimed role as guarantor of neutral laws of general application. Instead of close consideration of particular disputes in the context of living communities, the Court has adopted a breathtakingly broad New Formalism. With a few possible exceptions,⁶ the fundamental premise of the *Smith/Boerne* approach is that religious matters may be left to majoritarian political processes, but only at the state level.

Critical to this New Formalism maneuver is concern with jurisdiction, an abstract construct that is used and abused most comfortably by those with legal

McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); David C. Williams & Susan H. Williams, *Volitionism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991).

³ HOWE, *supra* note 1, at 4.

⁴ 494 U.S. 872 (1990) (stating that Oregon need not demonstrate compelling state interest to deny unemployment benefits to members of Native American Church for use of peyote in religious ceremony). I should mention that I co-authored an amicus curiae brief for the American Civil Liberties Union before the Supreme Court in this case.

⁵ 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act of 1991, in which Congress attempted to return to pre-*Smith* requirement that government demonstrate compelling state interest and narrowly tailored regulation to overcome legitimate Free Exercise Clause claim).

⁶ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating local "religious gerrymander" banning ritual animal sacrifice as violation of "fundamental nonpersecution principle" of First Amendment). To meet the test announced in *Lukumi*, however, there must be convincing proof of an overt governmental effort to "infringe upon or restrict practices because of their religious motivation." *Id.* at 533. The *Smith* decision leaves a further possible future opening for governmental intrusions impinging upon what the Court might consider "hybrid" constitutional rights, i.e., rights that combine, for example, freedom of expression with free exercise. If this judicial innovation is unduly complicated and formalistic, it is also not at all convincing as a way to distinguish key precedents such as *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), from *Smith*. Ironically, the Court's sweeping proclamations in *Boerne* seem, in turn, to be anchored largely on defensiveness about the brave new constitutional world proclaimed in *Smith*.

training. Decisions couched as questions of jurisdiction allow judges to claim that they are the exclusive gatekeepers, patrolling essential binary choices between the states and the federal government and among the separate branches of the federal government. Neither the lower federal courts nor Congress may continue to require that state and local authorities justify general intrusions on religious freedom, so long as any such limitations are unintended or not aimed specifically at religious belief and conduct.

In the name of the basics of constitutionalism, judges now purport to maintain a different kind of wall of separation, a Great Wall high above the messy intricacies of daily life. Our marblecake of federalism⁷ – a mishmash of intersecting federal, state, and local powers and the intricate crisscrossing by private individuals with multiple memberships, loyalties, and moral commitment – can hardly be discerned from the judicial watch post high atop the Great Wall. This Great Wall eventually may separate nothing lasting, and it could well become the functional legal equivalent of a tourist attraction. For the moment, however, the new Great Wall casts a giant shadow in constitutional law.

To be sure, the very complexity of contemporary life underscores how important it is for some legal order amid the chaos, and for what at least appear to be final decisions about vexing conflicts.⁸ Moreover, any formal legal system – and for that matter any regimen of norms, customs, and usages whether formal or not – must rely upon jurisdictional assumptions at or near its foundation.⁹ Just as most modern lives involve shifting and repeatedly negotiated boundaries of loyalty, membership, and kinship, however, most legal disputes occur in the shadow of at least several different normative sources.

⁷ Morton Grodzins apparently first offered the image of American federalism as a “chaotic marble cake” in response to cleaner, less realistic “layer cake” metaphors. See Morton Grodzins, *Centralization and Decentralization in the American System*, in *A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM* 1, 4 (R. Goldwin ed., 1963).

⁸ This helps explain what was particularly noteworthy about the Court’s innovative use of the Federal Rules of Civil Procedure Rule 60 (b)(5) in *Agostini v. Felton*, 521 U.S. 203 (1997), as it overruled several Establishment Clause decisions about aid to sectarian schools for remedial programs. The *Agostini* majority held that under that Rule, which is couched in terms of relief from a decision “no longer equitable,” parties challenging a Supreme Court precedent were entitled to relief from a District Court injunction on the grounds that the precedent might be and should be overruled. See *id.*

⁹ The biblical command, “You shall not displace your neighbor’s boundary-marks which your forerunners have set up,” nicely illustrates the concern, for example, as well as some of the basic conservatism of customary legal systems. *Deuteronomy* 19:14. As the Hellenist commentator Philo explained, “For customs are unwritten laws, the decisions approved by men of old, not inscribed on monuments nor on leaves of paper which the moth destroys, but on the souls of those who are partners in the same citizenship.” JAMES L. KUGEL, *THE BIBLE AS IT WAS* 512 (1997).

We have traveled a great distance from vigilance concerning "a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world."¹⁰ Indeed, there have been numerous recent attacks upon the very metaphor of a wall of separation, now generally attributed to Thomas Jefferson without acknowledgment of its earlier appearance in the radical religious thought of Roger Williams. It has become almost a standard trope to pin Jefferson to the "wall of separation" and then to proclaim, for example: "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."¹¹

I. TENDING ONE'S GARDEN: "FULL AND EQUAL RIGHTS OF CONSCIENCE"

The Court's lack of concern for the fragility of both hedges and walls protecting full freedom of conscience suggests a pressing commitment to assert the Court's own homogenizing authority. At such a time, Candide's famous advice to withdraw and to tend one's own garden¹² is enticing, but dangerous. Instead of quiet acceptance of the New Formalism, at least for the time being, it is worth pondering Mark DeWolfe Howe's clear warning: "the importance of the Court's work lies not merely in the results of its deliberations but in the processes by which it reaches them. The complexities of history deserve our respect."¹³

What is most striking about the New Formalism is how rigidly statist the current Court turns out to be. This Court is fundamentally statist in a double sense: in its willingness to defer to government decision-makers generally over claims anchored in religious beliefs,¹⁴ and in its enthusiastic embrace of the

¹⁰ Roger Williams, *Mr. Cotton's Letter Lately Printed, Examined and Answered*, in PERRY MILLER, *ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION* 89, 98 (Atheneum 1953) (reprint 1970) (1644).

¹¹ *Wallace v. Jaffree*, 472 U.S. 38, 91-92 (1985) (Rehnquist, J., dissenting). Then-Justice Rehnquist's choice of a 40-year timeframe is somewhat curious. Clearly, however, he very much dislikes the results of decisions during these 40 years, particularly given that his opening quote of the "wall of separation" metaphor is from *Reynolds v. U.S.*, 98 U.S. 145, 164 (1879), a case more than a century old. To Rehnquist, Jefferson "would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Wallace*, 472 U.S. at 91-92 (Rehnquist, J., dissenting). We will return to the role of Jefferson and James Madison, and the issue of detached observers, shortly.

¹² See VOLTAIRE, *CANDIDE* 120 (Lowell Bair, trans., Bantam Books 1959).

¹³ HOWE, *supra* note 1, at 174, 176.

¹⁴ The Court emphasized and relied upon what it termed "internal government matters" in *Lyng v. Northwest Indian Cemetery Association*, 485 U.S. 439, 448 (1988), and *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986). For a powerful critique, see Williams & Williams, *supra* note 2.

power of states *qua* states to regulate and even to penalize religious action and belief. What is even more startling, however, is how often the Court's recent decisions seek to chop through the Gordian knots of Free Exercise and Establishment Clause interpretation. Sweeping initial premises and simplified binary choices now dominate. These decisions are hardly true to text, precedent, history, or even logic, but the demands of the perceived metes and bounds of formal neutrality rule the day.

This essay does not claim that we are firmly bound by the Framers' original intent, even were we able to discern it. This is so whether or not those present at the creation – whenever that was and whoever they were – intended to bind the future with their words or intentions.¹⁵ Instead, by briefly examining a largely overlooked strand of intellectual and social history concerning a guarantee of full rights that directly connects texts surrounding the First Amendment to texts surrounding the Fourteenth Amendment, I seek to illustrate how the formal neutrality desperately sought by the current Court begins to seem much more the problem than part of the solution to legal controversies about religion.

Attention to historical nuances emphasizes the importance of multiple perspectives and the need for sensitivity to different contexts within the realm of freedom of conscience. The approach taken in this essay is quite different from the current fad for pronunciamientos – in the name of neutrality, detachment, and objectivity – that now dominate judicial discourse. Stories of origins have great significance in any society and, for that matter, for individuals and families, too.¹⁶ Rather than ignoring such elemental accounts, I suggest that we should attend to them and their histories with care. This

¹⁵ See, e.g., JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 3-34, 339-68 (1996); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1984). It may be relevant that, at the time of the American Revolution, church membership and even church attendance in the United States was remarkably low. Tom Paine was a runaway best-selling author – despite or perhaps in part because of his scathing attacks on religion, and the population of non-Protestants was infinitesimal – 25,000 Roman Catholics and 2,000 Jews – within a white population beginning to approach 3 million people. See JAMES MACGREGOR BURNS, *THE VINEYARD OF LIBERTY* 7 (1982). As Burns put it, "From the start the colonies had been alive with religious controversies, doctrinal disputes, sectarian splits and secessions, revivalism and evangelism, the importation of new creeds and dogmas from Europe, along with their carriers – alive also with rationalist, deist, and atheistic counterattacks on religion." *Id.* at 8. Much changed, of course, by the end of the Civil War, yet our filiopietistic approach to "the Framers" has all but blinded us to fundamental changes not only in the structure and relationships within the constitutional document, but within society. See CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* (1997); CHARLES MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (Simon and Schuster 1972) (1969).

¹⁶ Such stories are "how one generation tells another how the future shapes the present out of the past." MILNER BALL, *CALLED BY STORIES* 6 (2000) (quoting Paul Lehmann).

different historical vector contrasts sharply with the current Court's freeze-dried version of Framers' intent.

If we were to grapple with early commitments to "freely and fullye have and enjoy his and their owne judgments and consciences, in matters of religious concernment,"¹⁷ for example, or if Madison's proposed guarantee of "full and equal rights of conscience"¹⁸ were to be taken seriously, it would be much more difficult to propagate the New Formalism's intransigent commitment to statism. Instead, we would have to consider specific cases in context while heeding the perspectives of those whose beliefs and actions are protected by the Free Exercise Clause; particularly because, in the words of Justice Jackson, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."¹⁹ Let me explain.

II. BURDENS AND HISTORY: "THE DUNG HEAPE OF THIS EARTH"²⁰

A. Origins

Roger Williams was extraordinary. A generation ago, Williams's role as the founder of Rhode Island who led the little colony to unprecedented toleration for religious dissent seemed quite significant, and Howe, Perry Miller, and Edmund S. Morgan provided accessible detail about Williams's ideas and actions. Yet today, hardly anyone seems to know or care that Williams actually forged toleration out of his deep religiosity and his unyielding belief in predestination.

Massachusetts Bay Colony, populated largely by Puritan dissenters, actually went further than had any other government in the western world in separating church and state, yet Roger Williams's brand of separatism proved too radical

¹⁷ Office of the Rhode Island Secretary of State, RHODE ISLAND CHARTER OF 1663, 1996.

¹⁸ 1 ANNALS OF CONG. 486 (Gales & Seaton eds., 1789) (Madison's proposal for what became the First Amendment). There are two printings of the first two volumes of the *Annals of Congress*. This article cites to the 1834 "Gales & Seaton" edition.

¹⁹ West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

²⁰ EDMUND S. MORGAN, THE PURITAN DILEMMA 130 (1958). When John Winthrop urged Roger Williams to consider whether everyone else could be wrong except Williams himself as Williams pursued the logic of his separatist beliefs, Williams urged Winthrop to join him in splendid isolation: "[A]bstract yourself with a holy violence from the Dung heape of this earth." *Id.* Williams's views on the need for purity in the Church had become quite extreme. It was at this point that Williams "having, a little before, refused communion with all, save his own wife," according to Winthrop, decided that "now he would preach to and pray with all comers." *Id.* at 131.

for Massachusetts. Williams was banished and headed south in the dead of winter, 1635-36.²¹

It was indeed a radical move for Williams to assert that the link between church and state had been improper from the start and was a grave disservice to Christ. When Constantine adopted Christianity, Williams argued, "then began the great Myserie of the Churches sleepe, the Gardens of Christs Churches turned into the Wildernesse of Nationall Religion, and the World (under Constantines Dominion) to the most unchristian Christendome."²² To Williams, God's true religion could and would take care of itself. It should not be defended with anything but spiritual weapons.

"By accepting the alleged help of the temporal sword," Williams believed, "a church proclaimed itself false."²³ In following his radical ideas about the role of Christ to their logical conclusions, Williams severed not only the connection between God and the established Church, but also the nexus between God and secular government. The theory of the divine right of kings that James I developed during Williams's lifetime partially as a bulwark against Roman Catholic hierarchical claims was but a logical extension of the overlapping authority of church and state that permeated English life. Williams liked to cite his own banishment from Massachusetts to emphasize the wrongheadedness of any such use of secular power for sectarian ends.

Given Williams's own experiences, together with the developing role of Rhode Island as a haven for dissenters, it is hardly surprising that when the colony finally procured a royal charter from Charles II, protection for both "free" and "full" enjoyment of judgment and conscience – individual and collective – had become a central concern. The 1663 Charter, which had been obtained primarily through the efforts of the Baptist Dr. John Clarke, to assure "full liberty, in religious concernments," even trumped contrary law, custom, or usage, at least to the point that the exercise of free and full liberty of conscience might interfere with public peace or cause civil injury or disturbance to others.²⁴ The Charter thus formalized Williams's evocation of a long-

²¹ Edmund S. Morgan offers an admirably clear and succinct account of the complicated series of confrontations between Massachusetts Bay governmental and religious authorities. *Id.* at 115-33.

²² EDMUND S. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* 96 (1967) (quoting Roger Williams).

²³ *Id.* at 98. Thus, Williams anticipated Kathleen Sullivan's position that on current church-state issues "[w]e should have more faith in faith." Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 223 (1992).

²⁴ From the Rhode Island Charter:

[T]hat noe person within the colonie, at any time hereafter shall be in any wise molested, punished, disquieted or called in question for any differences in opinions in matters of religion . . . but may from time to time, and at all times here after, freelye and fullye have and engage in his and their own judgments and consciences, in matters of religious

standing Christian tradition that differentiated between two tables of the Decalogue: the first four commandments were taken to refer to duties to God, the fifth through tenth to duties owed to fellow human beings. The first table was religious; only the second table was properly subject to legitimate civil coercion. From his own firm religious position, therefore, Roger Williams developed the crucial importance of a sharp separation between the commands of church and state.

Though sorely pressed at times (particularly by the troublesome radical views and actions of Quakers), Rhode Island thus began a tradition of religious tolerance for which the colony soon became notorious. A leading legal scholar recently claimed that "[i]t is unlikely that the Rhode Island provisions had much direct influence on subsequent developments of the free exercise principle."²⁵ Yet the very words of the Rhode Island Charter – particularly its

concernments . . . not using this libertie to licentiousnesse and profanenesse, nor to the civil injurie or outward disturbance of others.

2 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* 46 (1936). After quoting this portion of the Rhode Island Charter in her dissent in *City of Boerne v. Flores*, 521 U.S. 507, 552, (1997), Justice O'Connor made the point that other colonies "similarly guaranteed religious freedom, using language that paralleled that of the Rhode Island Charter of 1663." *Id.* (O'Connor, J., dissenting). Concurring, Justice Scalia countered by emphasizing the "'provisos' that significantly qualify the affirmative protections" granted in the early "'free exercise' enactments." *Id.* at 539 (Scalia, J., concurring). Scalia relied primarily on Hamburger, *A Constitutional Right*, *supra* note 2, at 915, and on Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 624 (1990). Neither of these scholars dealt with the issues presented by the "full" guarantee.

²⁵ McConnell, *supra* note 2, at 1427. McConnell relies primarily on WILLIAM GERALD MCLOUGHLIN, *NEW ENGLAND DISSENT: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE, 1630-1833* (1971). McConnell adds, however, that the language of the Rhode Island Charter "had a second and third life elsewhere in the colonies," and that "the substance of these early provisions later re-emerged as the most common pattern in the constitutions adopted by the states after the Revolution." McConnell, *supra* note 2, at 1427. It is difficult to prove or disprove "direct influence," of course: and the standard McConnell invokes – "subsequent developments of the free exercise principle" – defies easy calibration. Moreover, leaders in the Great Awakening of the 1740s and then again within the successful activism of Baptists in the Revolutionary era rediscovered Williams and celebrated the experiments in religious freedom in Rhode Island and Pennsylvania. Isaac Backus, for example, "utilized also the long-forgotten arguments of Roger Williams to defend the doctrines of separation," and these were arguments which Backus "knew thoroughly," according to his biographer, who claims in his preface that Backus merits comparison with Williams. WILLIAM GERALD MCLOUGHLIN, *ISAAC BACKUS AND THE AMERICAN PIETISTIC TRADITION* 124, 191, xii (1967) [hereinafter MCLOUGHLIN, ISAAC BACKUS].

Some experts have emphasized the broad familiarity of those at the Constitutional Convention with the religious freedom guarantees of Rhode Island and Pennsylvania, *see, e.g.*, LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 88 (1953); 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 231 (1964). Others have emphasized a direct link between a long-standing Christian tradition and Williams's radical ideas as to how to make freedom of

guarantee of protection for manifestations of free and full conscience, including actions as well as beliefs – began to recur in other texts. Moreover, toleration proved difficult to contain within a New World full of relative diversity, generally anxious for more settlers, and affording numerous avenues of escape.²⁶

B. Echoes: Jefferson and Madison

Extensive recent scholarship has been devoted to the history and meaning of the Free Exercise Clause, tracing in particular its roots in the vehement, even revolutionary, controversies surrounding religious freedom and the disestablishment of the Church of England and its successors in Virginia.²⁷ Indeed, we have been treated to an unusually direct clash within the Court over who or what constitutes the relevant history for the First Amendment's

conscience real in a new world literally surrounded by the wilderness. According to a religious studies expert, for example, the Jefferson-Madison "one-two punch on behalf of religious freedom in the 1780s" had its "strongest connection . . . to the 'free church' strand of the tradition, represented most characteristically by Roger Williams." David Little, *Religion and Civil Virtue in America: Jefferson's Statute Reconsidered*, in *THE VIRGINIA STATUTE*, *supra* note 2 at 249. Even Perry Miller, who asserted in the early 1950s that Williams "exerted little or no direct influence on theorists of the Revolution and the Constitution," went on to explain that "as a figure and a reputation he was always there to remind Americans that no other conclusion than absolute religious freedom was feasible in this society. . . . As a symbol, Williams has become an integral element in the meaning of American democracy, along with Jefferson and Lincoln." PERRY MILLER, *ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION* 254-55 (1953).

²⁶ For example, as William Penn set about to create a haven for Quakers in the New World, who at the time were still being banished, whipped, and occasionally hung in Massachusetts, the initial laws of Pennsylvania unsurprisingly emphasized freedom of conscience. Yet in 1705, the Pennsylvania General Assembly adopted a new law concerning "Liberty of Conscience" guaranteeing that, in addition to not being molested or prejudiced for conscientious persuasion, any of the populace could henceforth "[f]reely and fully enjoy his or her Christian liberty in all respects, without molestation or interruption." *THE EARLIEST PRINTED LAWS OF PENNSYLVANIA, 1681-1713* 36 (John D. Cushing ed., 1978).

²⁷ The best recent account of the history of the Free Exercise Clause is McConnell, *supra* note 2. For a careful critique of McConnell, see Hamburger, *Constitutional Right*, *supra* note 2, and for McConnell's reply see Michael McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 *GEO. WASH. U. L. REV.* 685 (1992). These and other scholars have not much heeded earlier important work such as that by Leo Pfeffer and Mark DeWolfe Howe. There are numerous gems concerning the antecedents, context, and conflicts over ideas of religious freedom in the late eighteenth century within a fine series of essays published for the bicentennial of the Virginia Statute for Religious Freedom, written by Thomas Jefferson in 1777 and pushed through the thickets of Virginia politics by James Madison in 1785. *THE VIRGINIA STATUTE*, *supra* note 2.

Religion Clauses.²⁸ Even the Library of Congress has been pulled into the fray.²⁹

This is surely not the place to respond systematically to the sustained assault on the "wall of separation" metaphor launched in recent years by "conservative" Justices and commentators,³⁰ though some refutation beyond Justice Souter's careful and quite gentle response seems in order. Perhaps the most striking recent revisionist effort has been the attempt to drive apart the thought of Jefferson and Madison, and thereby to lower or poke holes in what is alleged to be Jefferson's more insistent "wall of separation" by emphasizing Madison as more prominent for constitutional purposes and as more inclined to favor religion.³¹ This purported division between Jefferson and Madison seems dubious at best.³²

²⁸ Compare *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting), with *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Souter, J., concurring). See also the competing opinions of Justices Thomas, concurring, and Justice Souter dissenting – joined by Justices Stevens, Ginsburg, and Breyer – in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

²⁹ See Diego Ribadeneira, *New Debate Flares Over Jefferson's View of Church and State*, BOSTON GLOBE, Aug. 1, 1998, at B2.; Laurie Goldstein, *Fresh Debate on 1802 Jefferson Letter*, NEW YORK TIMES, Sept. 10, 1998, at A20 (reporting letter from two dozen historians criticizing paper by James Huston, chief of the Library's manuscript division, about Thomas Jefferson's 1802 Letter to the Danbury Baptist Association that contains the famous "wall of separation" metaphor).

³⁰ See, e.g., *Wallace*, 472 U.S. at 91 (Rehnquist, J., dissenting) (building upon an argument made in a brief filed on behalf of Douglas T. Smith and other intervenors in the *Wallace* case); *Rosenberger*, 515 U.S. at 852 (Thomas, J., concurring). But see, e.g., Justice Souter's reply *id.* at 868-74. This campaign is said to contrast to that of "ideological plaintiffs," who insist on a strict separation approach to school funding issues. For a particularly irascible example of the argument, see RICHARD E. MORGAN, *DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME* 22-45 (1984). See also Glendon & Yanes, *Structural Free Exercise*, *supra* note 2, at 482 (1991).

³¹ Michael McConnell, for example, insists on the importance of "the contrasting positions of Jefferson and Madison regarding the religion issue." McConnell, *supra* note 2, at 1449. He associates Jefferson with Locke, and with an "Enlightenment-deist-rationalist stance toward religious freedom." *Id.* at 1452. McConnell claims that, by contrast, Madison had a "more affirmative stance toward religion" and a "more generous vision of religious liberty" that "more faithfully reflected the popular understanding of the free exercise provision that was to emerge both in state constitutions and the Bill of Rights." *Id.* at 1453, 1455.

³² See, e.g., JACK RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 14 (1990); Dumas Malone, *The Madison-Jefferson Friendship*, in JAMES MADISON ON RELIGIOUS LIBERTY 303, 304 (Robert S. Alley ed., 1985) ("The two men may not have been entirely consistent about other forms of freedom, although they were powerful advocates of them, but on religious freedom they were absolutely consistent."); ADRIENNE KOCH, *THE GREAT COLLABORATION* 30, 49 (1950). While those who would divide the two Virginians stress that Jefferson derived his ideas from John Locke, other experts note that John Locke

was not merely a religious man. He was a master theologian with his own view of revelation and its exposition, with his own very clear, very moderate, very persuasive

It is helpful first to take a step back: As Thomas Jefferson grudgingly awaited his first and perhaps most noteworthy brush with greatness in Philadelphia in the late spring and summer of 1776, he could hardly contain his frustration at being obliged to be away from Virginia while a new Virginia Constitution was in the works. Failing in his effort to be recalled, Jefferson prepared and sent three draft constitutions to the convention, but it remains unclear when his drafts actually arrived. It is clear, however, that Jefferson's third draft – sent via George Wythe and Richard Henry Lee – reached the delegates before they had formally finished their work, and parts of it were added as a preamble to the Virginia Constitution, albeit not enough of it to quell Jefferson's serious doubts about the constitution as it was enacted.

For our purposes, however, it is striking that Jefferson's draft echoed Rhode Island and Pennsylvania when it provided: "[a]ll persons shall have full and free liberty of religious opinion; nor shall any be compelled to frequent or maintain any religious institution."³³ The similarity is hardly surprising. Lawyers tend to look to what others have done in similar situations, and Jefferson was exceptional for many things, including his dogged willingness to do extensive historical research and to take pains about his writing, often invoking phrases he had heard or read elsewhere.³⁴

vision of the essentials of Christianity free from the dogma and the controversies, the elaborations, and, as he thought, the quibbles that had marred that exposition up to his time. That he constantly appeals to reason and makes reasonableness his criterion should lead no one to suppose that he is a rationalist in the sense of a critic of Christianity superior to its influences.

JOHN T. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE* 76 (1987). Moreover, an earlier attack on the "wall of separation" approach criticized Madison precisely because of the closeness of his thought to that of John Locke. See, e.g., John Courtney Murray, *Law or Prepossessions?*, 14 *LAW & CONTEMP. PROBS.* 23, 29 (1949). For the initial disagreement between Jefferson and Madison about clergy serving in public offices, see *McDaniel v. Paty*, 435 U.S. 618, 624 (1978). Madison eventually convinced Jefferson that clergymen should not be banned on grounds both of protecting free exercise of religion and because "it violate[s] another article of the plan which exempts religion from the cognizance of Civil power." 11 *PAPERS OF JAMES MADISON* 288 (Robert A. Rutland & Charles F. Hobson eds., 1977).

³³ THE VIRGINIA STATUTE, *supra* note 2; see also NOONAN, *supra* note 32 at 76.

³⁴ See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1997); Thomas E. Buckley, S.J., *The Political Theology of Thomas Jefferson*, in THE VIRGINIA STATUTE, *supra* note 2, at 85. Jefferson had no doubt that "[i]f is *unalienable right* . . . is religious," as he put the point in his cryptic debate notes for a speech in the Virginia House of Delegates in the Fall of 1776. 1 THE PAPERS OF THOMAS JEFFERSON 537 (Julian P. Boyd ed., 1950) (emphasis in original). Philip Hamburger provides a careful, illuminating study of the role of natural rights claims for religious freedom in the context of an ongoing dispute between advocates of equal protection and equal civil rights. See Hamburger, *Equality and Diversity*, *supra* note 2. However, Hamburger does not discuss the contemporaneous attention given to the vindication of "full" and "complete" religious freedom.

If anything, however, James Madison sought to go further, though his language was quite similar to what Jefferson proposed. As Madison overcame his shyness in his fight to amend George Mason's proposed language for the Virginia Constitution, Madison suggested the following:

That Religion or the duty which we owe to our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are *equally entitled to the full and free exercise* of it, according to the dictates of Conscience; and therefore that no man or class of men, ought, on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, unless under colour of religion, the preservation of equal liberty and the existence of the State be manifestly endangered.³⁵

Like Jefferson, his trusted ally in the long campaign for religious freedom in Virginia, Madison thus invoked the old Rhode Island "full and free" formula. Madison went further in that he attached the "full and free" guarantee to the exercise of one's reason and conviction – explicitly covering more than did Jefferson's connection of the "full and free" guarantee only to "opinion."³⁶ Madison also sought to link the new guarantee directly to the demands of equal entitlement. Moreover, for Madison, religion could not be the basis either for favorable emoluments or privileges, or for any penalties or disabilities. The only limitation upon this sweeping Madisonian principle, in fact, was when it was necessary to preserve equal liberty *and* if the existence of the state were otherwise to be "manifestly endangered."³⁷

³⁵ 1 THE PAPERS OF JAMES MADISON 177 (William T. Hutchinson & William M.E. Rachal eds., 1962) (emphasis added). (I have generally referred back to the Madison Papers whose first volume is cited here, though the series had many different editors since it began in 1962). Madison later went out of his way to annotate in his own hand a printed version of the 1776 enactment, and to claim it emphatically as his own. The editors of the Madison Papers assume that Madison penned what they call this "remarkable footnote" many years later, and that his memory was not entirely accurate. *See id.* at 174-79. There is a similar problem, of course, in the frequent reliance on Madison's notes of the Constitutional Convention – the best source we have – which he edited and did not make available until many decades later. In any event, the version quoted, which the editors consider "a largely meaningless whole," reflects Madison's mature reflection as to what at least he wished he had done as a young man. As illustrated in quotations *infra* notes 36-37, Madison did recall accurately the parts of his contemporaneous 1776 amendments that are directly relevant.

³⁶ *See id.* at 174. The quotation is from Madison's first proposed amendment, dated between May 29 and June 12, 1776.

³⁷ Madison's second proposed amendment, which also dates from between May 29-June 12, 1776, would have protected "the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless the preservation of equal liberty and the existence of the State are manifestly endangered." *Id.* at 174-75. It thus somewhat anticipates the "compelling state interest" test, the standard of review used in free exercise cases generally for decades until that standard was rejected in *Smith*. Though much

It is well-known that Madison got his start as a vocal proponent of religious freedom when, as a 22-year-old, he was shocked to discover five or six “well meaning” Baptists in close confinement in the jail in a neighboring Virginia county. In his famous letter to his Princeton friend William Bradford, Madison revealed his “unaccustomed fervor” as he wrote concerning “[t]hat diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their quota of Imps for such business.”³⁸ Madison early in life thus experienced and viscerally identified with those persecuted for their religious beliefs. Madison’s strong reaction – “[t]his vexes me the most of any thing whatsoever”³⁹ – apparently anchored his lifelong fervor in favor of religious freedom. There may have been political advantages, to be sure, but it is striking that Madison repeatedly demonstrated an unusual ability to understand the demands of various points of view about religion, even when they differed markedly from his own perspective. Empathy with dissenters, for example, helps explain Madison’s insistence that government could not incorporate the Episcopal Church, give land to a Baptist Church, or even run the risk of being seduced by the “laudable” motive of supporting the chaplaincy in the armed forces and Congress.⁴⁰

Despite all the recent revisionism, there seems little disagreement as to the central constitutional role played by James Madison. After all, he was the initial proponent of language that, following redrafting, became the text of the First Amendment. Yet there has been little notice of some of the most suggestive wording of the constitutional guarantee as James Madison first proposed it during the First Congress in June 1789.⁴¹ Madison moved to

has been written in recent years about the breach of the peace limitation on religious freedom, see, e.g., Hamburger, *Constitutional Right*, *supra* note 2, Madison’s explicit rejection of that standard as early as 1776 has received little if any notice.

³⁸ 1 THE PAPERS OF JAMES MADISON, *supra* note 35, at 106.

³⁹ *Id.*

⁴⁰ 1 MESSAGES AND PAPERS OF THE PRESIDENTS 489-90 (J.D. Richardson ed., 1900); see also Elizabeth Fleet, *Madison’s “Detached Memoranda,”* in 3 WILLIAM AND MARY QUARTERLY (3d Series) 559 (1946).

⁴¹ Those who seek to undermine or to breach the “wall of separation” approach to the Establishment Clause emphasize the fact that once, during the War of 1812, Madison invoked God in a presidential proclamation. It seems more telling that Madison several times refused such proclamations on grounds of his fear of religious establishment, and later expressed his great regret that he had abandoned his principles under political pressure during wartime. See *Lee v. Weisman*, 505 U.S. 577, 609 (1992). Madison’s 1813 Thanksgiving Proclamation hardly counteracts his long campaign against religious establishment throughout his adult life, just as a stipend to support a religious chaplain to an Indian tribe does not outweigh Jefferson’s manifold objections to religious establishment. Such arguments tend to isolate each historical figure at a particular moment and to extrapolate very liberally from some specific deed, rather than to attend to the substantial efforts and great pride these two men invested throughout their lives in the pursuit of freedom of religion.

amend the Constitution as follows: "[t]he civil rights of none shall be abridged on account of religious belief or worship; nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."⁴²

Most revealing for our purposes is Madison's proposed guarantee of "*full and equal* rights of conscience." The guarantee reads as absolute. It disallows any pretext or any manner of infringement. This is noteworthy in itself, particularly because this guarantee was not redundant, but rather an addition to the proposal's initial protection against infringement of civil rights on account of religious belief or worship. Still more significantly, however, Madison's phrase "full and equal" encapsulates an approach to freedom that, in its very terms, appears to extend beyond formal equal treatment.

Madison's draft was altered significantly, of course, in the process of becoming the First Amendment that we all know. Yet it is likely that, as Professor McConnell put it, "the deletion of 'full' by the [Select] Committee was no more than stylistic and that the word 'equal' was deleted so as not to

Those who doubt Madison's rigorous opposition to the establishment of religion, for example, have to explain away his eloquence in his Memorial and Remonstrance, in which Madison invoked the proofs of history in the "American Theatre" that had demonstrated already how much the "equal and compleat liberty" of religion could successfully counter the "malignant influence on the health and prosperity of the state, which was discoverable throughout history whenever the secular arm sought to 'intermeddle with Religion.'" NOONAN, *supra* note 32, at 110. They also must overlook Madison's successful joint venture with Jefferson during which they advocated vigorously on many fronts and persuaded Virginia to adopt its pioneering Statute for Religious Freedom. Ironically, one does not find those who would cast asunder Jefferson and Madison, purporting to be bound by original intent, and who tend to favor states rights and even, at times, to question the application of the First Amendment to the states through the Fourteenth Amendment, mentioning that, on the eve of the Constitutional Convention, Madison favored an approach that would allow "a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful." Letter to Edmund Randolph, in 9 PAPERS OF JAMES MADISON 368 (Robert A. Rutland & William M.E. Rachal eds., 1975). Unlike the James Madison who was author of the Virginia Resolutions protesting the Alien and Sedition Acts of 1798, James Madison in Philadelphia in 1787 fought for a congressional veto over state laws and advocated power in Congress to legislate in all cases when Congress deemed the states incompetent to act. The James Madison who proposed the Religion Clauses in the First Congress that led to the first part of the First Amendment

conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against State Governments. He thought that if they provided against the one, it was as necessary to provide against the other.

1 ANNALS OF CONG., *supra* note 18, at 755.

⁴² 1 ANNALS OF CONG., *supra* note 18, at 755. Madison's proposal and the subsequent cryptic debate and redrafting process are set out usefully in NOONAN, *supra* note 32, at 119-26. These materials, as well as state and other sources, are in McConnell, *supra* note 2.

create a negative inference.”⁴³ It may be sensible, in fact, to discern elements of Madison’s guarantee of “full” rights of conscience in the Free Exercise Clause, and to see some of his “equal rights” concern in the guarantee against the establishment of religion. Such an approach would not resolve all the tension between the two clauses, to be sure, but it would bolster a unitary, structural approach to the Religion Clauses.⁴⁴ Such an approach wisely echoes Madison’s proposal, first made as early as 1776, that provided that fear of a breach of the peace would not provide adequate justification for governmental intrusion on beliefs or actions embedded within the freedom of conscience of an individual or a dissenting religious group.⁴⁵

At the very least, Madison’s initial proposal on religious freedom provides relatively clear evidence of this crucial constitutional actor’s idea about what would constitute an appropriate guarantee of religious freedom. It is also consistent with the major innovation at the Constitutional Convention that

⁴³ McConnell, *supra* note 2, at 1482.

⁴⁴ Justice Brennan, concurring in the decision invalidating Bible reading in the public schools, proclaimed, “the role of the Establishment Clause as co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone.” *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 256 (1963). For surprising overlapping support for such an integrated approach, compare PFEFFER, *supra* note 25, at 121-24, with Glendon & Yanes, *supra* note 2. Like misery and politics, law and religion seem to make strange bed-fellows. A unified approach – though it is not without internal tension, can be overly abstract, and does entail considerable unpredictability – seems to echo Madison’s concerns in his 1785 Memorial and Remonstrance. Madison repeatedly warned that the majority would tend to trespass on the rights of the minority. Thus, for example, he asked rhetorically, “[w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?” NOONAN, *supra* note 32, at 108. To Madison, it was obvious that “equality . . . ought to be the basis of every law;” and he proclaimed that “[a]bove all are [all men] to be considered as retaining an ‘equal’ title to the free exercise of religion according to the dictates of Conscience.” 8 THE PAPERS OF JAMES MADISON 300 (Robert A. Rutland & William M.E. Rachal eds., 1973) (quoting Article XVI of the Virginia Declaration of Rights) (emphasis in original).

⁴⁵ It is a commonplace that in the early years of the Republic, one state after another embraced Madison’s position, disestablished churches, and began to accommodate the free exercise of religion by dissenters. Thus, Isaac Backus spotted a trend and could proclaim in 1805 that:

[t]he liberty that [Roger Williams] was for, civil and religious, is now enjoyed in thirteen of the seventeen of the United States of America. No tax for any religious minister is imposed by authority in any of the said thirteen States, and their power is much weakened in the other four.

MCLOUGHLIN, ISAAC BACKUS, *supra* note 25, at 209. The remarkably kinetic quality of legal change within American history is seldom acknowledged by lawyers and judges who tend to seek abstract rules – purportedly established with simple clarity in the past – at a particular frozen moment in order to resolve complex contemporary questions.

eliminated religious qualifications for federal office holders.⁴⁶ Madison promised Baptist leaders in Virginia that, if elected to the First Congress, he would do his best for "the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude."⁴⁷ Far from being the reluctant dragon portrayed by Justice Rehnquist, Madison became a veritable nag in that first Congress due to his efforts to amend the Constitution.⁴⁸

As Jefferson and Madison discussed whether it was necessary or wise to amend the federal constitution, both repeatedly gave freedom of religion pride of place. These two friends, who characteristically studied past precedent carefully and who mutually delighted in their abilities as wordsmiths, again and again struggled in various venues to protect fundamental principles of religious freedom. In addition to guaranteeing free and equal treatment, both men also explicitly sought to protect *full* freedom of conscience.

III. FULL AND EQUAL IN THE RECONSTRUCTION ERA

As a matter of logic, full protection may be different from equal protection. "Full" implies substantive content – and perhaps some particularized consideration of differences – while "equal" generally is taken to require only

⁴⁶ See MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* (1984). Those who like to emphasize the presence of chaplains in Congress tend not to mention their absence in the Constitutional Convention. When Benjamin Franklin proposed that each session begin with a prayer, his motion was given the silent treatment and defeated by a motion to adjourn. See *RECORDS OF THE FEDERAL CONVENTION OF 1787*, vol. 1, 450-52 (Max Farrand ed., 1966).

⁴⁷ Letter from James Madison to the Rev. George Eve (Jan. 2, 1789), in 11 *THE PAPERS OF JAMES MADISON* 404 (Robert A. Rutland & Charles F. Hobson eds., 1977). Madison needed the support of the Baptists to defeat his friendly rival, James Monroe, for a seat in the House.

⁴⁸ In his argument from history within his dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985), then-Justice Rehnquist perceived Madison as "less . . . a dedicated advocate of the wisdom of such measures than . . . a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good." *Id.* at 93-94 (Rehnquist, J., dissenting). Rehnquist conceded that Madison was "undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights," but he insisted without citations that "it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution." *Id.* at 97-98 (Rehnquist, J., dissenting). *But see, e.g.*, DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* (1974); RAKOVE, *supra* note 15. Madison tried for nearly a month to get the House to consider his proposed amendments, and finally on July 21, 1789 he successfully "begged the House to indulge him in the further consideration of amendments to the Constitution" during what seemed "a moment of leisure." 1 *ANNALS OF CONG.* *supra* note 18, at 660. See generally *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* (Neil Cogan ed., 1997).

even-handed process.⁴⁹ The equal protection doctrine now centers almost entirely on equal treatment. The "protection" element of the equal protection guarantee has virtually disappeared. Indeed, even unequal treatment is not considered constitutionally problematic unless there has been a showing of discriminatory motive.⁵⁰ It is as if the Court has decided that equality has been achieved, albeit at an unspecified magic historical moment, and that now only purposeful deviations from this happy norm need be remedied.⁵¹

This attitude surely was not and hardly could have been the general approach during and immediately following the Civil War and the liberation of millions of slaves. In addition to the Reconstruction amendments, often rightfully called a Second Constitution, Congress passed statute after statute seeking to provide effective federal protection for the civil rights of the newly-freed slaves and their allies. Again and again, Congress guaranteed "full and equal" benefits of the laws, rights, and access. The story of this sustained congressional effort to ensure that the war's horrific carnage was not in vain has been told in considerable detail elsewhere.⁵²

⁴⁹ See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). For some of the best critical responses to Westen, see R. Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Kenneth Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387 (1985); Anthony D'Amato, Comment, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983). Westen responded to his critics in several articles, and then published PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF EQUALITY IN MORAL AND LEGAL DISCOURSE* (1990). See also Hamburger, *Equality and Diversity*, *supra* note 2.

⁵⁰ See *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979).

⁵¹ For a clear description and cogent critique of this approach in the realm of public policy discourse, see DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* (1997). I tried to put the Court's sanguine doctrinal approach into a larger historical and constitutional context in the chapter, *Involuntary Groups and the Role of History in American Law*, in AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 127-49 (1995).

⁵² See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* (1988); HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* (1982); LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* (1979); JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* (1990); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988). My efforts to detail these developments include Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L. J. 1916 (1987) and Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979) [hereinafter Soifer, *Protecting Civil Rights*]. See also, for example, Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L. J. 507 (1991); Earl M. Maltz, *The Concept of Equal Protection of the Laws - A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

For our purposes, it is significant enough that the 39th Congress – the very body that drafted and passed the text that was declared ratified in 1868 as the Fourteenth Amendment we know today – adopted the Civil Rights Act of 1866. Congress based this statute on its new enforcement power as provided by Section 2 of the Thirteenth Amendment. Indeed, the issue of Congress's authority was clearly joined when President Andrew Johnson vetoed the bill, and Congress overrode a presidential veto on a major piece of legislation for the first time in its history.

The 1866 Civil Rights Act directly rejected the *Dred Scott* decision even more forcefully than the Religious Freedom Restoration Act of 1993 ("RFRA") rejected the *Smith* decision. The 1866 Act began: "[t]hat all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States."⁵³ According to Congress, "such citizens of every race and color" were to be guaranteed a list of enumerated legal rights "without regard to any previous condition of slavery or involuntary servitude."⁵⁴ Moreover, these new citizens now were promised the same right "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."⁵⁵

Extensive Congressional hearings had emphasized the quotidian horrors under the Black Codes, as well as numerous blatant atrocities and failures to intervene by state and local authorities in the South. The 39th Congress therefore found it necessary to act on the federal level. In their view, this was hardly a time for great deference to the wisdom of the Supreme Court – the very people who brought the nation *Dred Scott*. Nor did the 39th Congress believe the country could afford to wait for ratification of the new constitutional amendment it was drafting to make constitutionally permanent the guarantees of the 1866 Act, including the almost verbatim repeat of the Enforcement Clause first constitutionalized in the Thirteenth Amendment.

When the Court struck down RFRA in *Boerne*, it simply ignored this history of congressional power to remedy the deprivation of rights against a background of judicial failure to do so. Congress's bold rejection of *Dred Scott* in the 1866 Civil Rights Act simply cannot be reconciled with *Boerne*'s proclamation of the Court's exclusive authority.⁵⁶ Under *Boerne* and its

⁵³ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (1991) and 42 U.S.C. § 1982 (1978)); CONG. GLOBE, 39th Cong., 1st Sess. 1857 (1866).

⁵⁴ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (1991) and 42 U.S.C. § 1982 (1978)).

⁵⁵ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (1991) and 42 U.S.C. § 1982 (1978) (emphasis supplied)).

⁵⁶ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 998 (1992), Justice Scalia, dissenting, joined by Chief Justice Rehnquist and Justices White and

insistently formalistic view of the separation of powers, only the Court could determine that the time was ripe to overrule *Dred Scott*. In fact, as a formal matter, however, the Supreme Court has never overruled its own tragic blunder in that decision.⁵⁷

The *Boerne* Court's crabbed view of Congress's Enforcement Clause power under the Fourteenth Amendment paid no heed whatsoever to historical context. Instead, Justice Kennedy somewhat testily declared for the majority:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.⁵⁸

Purportedly concerned about "vital principles necessary to maintain separation of powers and the federal balance,"⁵⁹ *Boerne* forbade Congress to

Thomas, excoriated his colleagues for their refusal to overturn *Roe v. Wade*, 410 U.S. 113 (1973). He wrote:

In my history-book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford*, an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co. v. Parrish*, which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal.

Casey, 505 U.S. at 998 (Scalia, J., dissenting) (internal citations omitted).

⁵⁷ In his classic work, Don Fehrenbacher quoted dictum from *Downes v. Bidwell*, 182 U.S. 244, 273-74 (1901), to the effect that the Civil War "produced such changes in judicial, as well as public sentiment, as to seriously impair the authority of [*Dred Scott*]." *Id.* Fehrenbacher then observed, however, "[t]his was perhaps as close as the Supreme Court ever came to declaring the *Dred Scott* decision totally overruled." DON E. FEHRENBACHER, *THE DRED SCOTT CASE* 585-86 (1978). While it generally has been assumed that the post-Civil War constitutional amendments rejected *Dred Scott*, as a formal matter no Supreme Court opinion even has purported to overrule it.

The *Boerne* logic, moreover, does not fit the context in which the 39th Congress passed the 1866 Civil Rights Act and drafted what became the Fourteenth Amendment. The early Reconstruction period was hardly a time of great respect for, or deference to, the United States Supreme Court. As the English historian W.R. Brock observed:

If one prong of the drive for legislative supremacy was directed against the Executive, the other was necessarily directed against the Supreme Court. The prestige of the Court, with the odium of *Dred Scott* still hanging about it, did not stand high, and the whole question of its political function was brought to a head by the famous case of *ex parte Milligan*.

W.R. BROCK, *AN AMERICAN CRISIS* 262 (1963). Indeed, it was largely fear of the Supreme Court that led the men of the 39th Congress to try to "constitutionalize" through the Fourteenth Amendment the federal guarantee they had provided in the 1866 Civil Rights Act, based on the Thirteenth Amendment. For a detailed discussion of this point and its context, see Soifer, *Protecting Civil Rights*, *supra* note 52.

⁵⁸ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

⁵⁹ *Id.*

alter the difficult burden of proof required in free exercise cases that the Court had newly established in *Smith*.⁶⁰ Defining and categorizing this "burden" has been a longstanding and key gatekeeping device in religion cases.⁶¹ In the Religious Freedom Restoration Act, Congress sought to alter the burden of proof and the standard employed by judges so that free exercise rights could be protected beyond overt discrimination or indifference. Appearing quite defensive about its recent *Smith* ruling, however, the *Boerne* majority boldly swept away RFRA, and with it apparently a good deal more of Congress's power to enforce other constitutional rights – and certainly a critical element of the nation's historical commitment to the protection of minority rights.

Good arguments have been made for and against both the wisdom and the constitutionality of RFRA.⁶² In the factual context underlying *Boerne*, for example, RFRA raised significant Establishment Clause problems that only Justice Stevens worried about directly. Moreover, RFRA's very breadth – and the fact that the claim made by Archbishop Flores to renovate and expand a church building had substantial implications for zoning power generally – undoubtedly contributed to the *Boerne* result.

It may have been somewhat false labeling for Congress to lay claim to the restoration of religious freedom through RFRA, though the aggressive sweep of Justice Scalia's *Smith* opinion surely made it seem that the rare victories for Free Exercise over the previous several decades were about to be obliterated entirely. Moreover, it is likely that Archbishop Flores would and should have

⁶⁰ Indeed the Court criticized the legislative record behind the Religious Freedom Restoration Act of 1993 ("RFRA") because it "lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 508. This might seem a careless overreading of *Smith*, which never mentioned "bigotry" as necessary to meet the constitutional standard. Yet the *Boerne* Court also criticized the legislative hearings: "It is difficult to maintain that they [“anecdotal evidence” introduced in the hearings] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country." *Id.* This second-guessing of the legislative process is revealing, particularly because the Court recognized that "[a]s a general matter, it is for Congress to determine the method by which it will reach a decision." *Id.* at 508-09. Protesting much too much in this way suggests considerable defensiveness about the *Smith* decision's departures from settled law. It also indicates how difficult actual proof of a violation of religious freedom will be after *Smith*, notwithstanding *Lukumi*, discussed *supra* note 6.

⁶¹ Lupu, *supra* note 2. Indeed, "[s]ome shifting of burdens is inevitable wherever there is religious liberty." ROSENBLUM, *supra* note 2, at 92.

⁶² See, e.g., Christopher L. Eisgruber & Laurence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171 (1995); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995); and other articles in this fine Montana Law Review Symposium on RFRA.

lost his case both before RFRA took effect and even under RFRA, had his property dispute gone to trial. Prior to *Smith*, the key nettlesome issue, of course, revolved around deciding when some government action imposed a substantial burden on religious activity – and then, even if a substantial burden were found, determining if some compelling state interest, narrowly drawn, might nevertheless prevail.

The degree of deference thus generally afforded government interests even within the pre-*Smith* universe might not have fit comfortably within the “full and free” guarantees of conscience propounded by Madison and Jefferson. But the *Smith/Boerne* Court’s brusque unwillingness to take acts of conscience into account at all – whether or not such acts are religiously based – seems to mark a substantial departure from the bold experimental hopes of the founders’ generation. Cloaked in the abstract garb of separation of powers and federalism, the New Formalism rejects much of the painful progress we have made as a nation, at least in part through a kind of constitutional common law construing free exercise. The Supreme Court now seeks to preclude that approach. The Court’s new precedents are sure to constrain, at least somewhat, the countless decisions made by individuals and groups throughout the United States who pursue freedom of conscience at least to some degree aware that they operate within the shadow of our law.

It may be useful to recognize how the *Boerne* majority opinion operated simultaneously on three separate, significant jurisdictional levels. First, as already discussed briefly, the Court felt obliged in defense of the *Smith* decision to rebuff emphatically what the Justices perceived to be Congress’s intrusion onto turf the Court had staked out exclusively for itself. Second, in the name of the “federal balance,” the Court emphasized its enthusiasm in *Smith* for leaving matters of religious accommodation to local and state political processes. Third, *Boerne* also firmly rejected a more personal claim: that religious belief might trump some general laws of neutral application, even when those laws were not “passed because of religious bigotry.”⁶³ A brief separate discussion of each of the three may prove illuminating.

A. “Substantive in Operation and Effect”⁶⁴

To limit Congressional power, *Boerne* promulgated a new constitutional standard of “proportionality and congruence,” to be used as the general

⁶³ *City of Boerne*, 521 U.S. at 530.

⁶⁴ *Id.* at 520. Conceding that the line “is not easy to discern,” the Court drew a constitutional boundary between “measures that remedy or prevent unconstitutional actions,” which are within Congress’s broad power under Section 5 of the Fourteenth Amendment, and “measures that make a substantive change in the governing law,” which Congress may not enact. *Id.*

measure of Congress's power under the Fourteenth Amendment's Enforcement Clause.⁶⁵ As a legal standard, "proportionality and congruence" necessarily requires judges to make discretionary judgments. No benchmark is set in advance, and the inquiry required to adjudicate proportionality and congruence pushes judges into doubly subjective decision-making about policy and politics, apparently unwilling to be aided by the views of Congress. This is hardly judicial restraint. Nor does it begin to resonate with the historical context of the Fourteenth Amendment.

The *Boerne* Court never mentioned the 1866 Civil Rights Act in the course of its dip into Fourteenth Amendment history. The majority invoked "[s]cholars of successive generations" but relied on nothing published later than 1966. Taken at face value, *Boerne*'s obsession with exclusive judicial authority not only would have made *Dred Scott* the law of the land until at least 1868, but it would also apparently invalidate the 1866 Civil Rights Act's broad array of federal protections for enumerated civil rights.⁶⁶

That this comparison with 1866 is not simply a provocative extrapolation became chillingly clear when the Court invoked the *Civil Rights Cases* as a primary source for its constitutional views. Infamously, the Court's decision to invalidate the guarantee made in the 1875 Civil Rights Act of "full and equal enjoyment" of a broad range of public accommodations did a good deal to legitimate the rise of Jim Crow.⁶⁷ In *Boerne*, the Court declared that the

⁶⁵ It probably is hard to find reasonable people in the United States today who are opposed to proportionality and congruence, though the Court seems thus to characterize the vast congressional majorities who approved the Religious Freedom Restoration Act of 1993. *But cf.* Sen. Barry Goldwater (R-Ariz.), during his 1964 presidential campaign ("Extremism in the pursuit of liberty is no vice.").

⁶⁶ The constitutional basis for the 1866 Civil Rights Act was the Enforcement Clause of the Thirteenth Amendment, whose words were repeated almost verbatim as Enforcement Clauses in the Fourteenth and Fifteenth Amendments. The Court upheld numerous federal civil rights statutes based entirely on these post-Civil War constitutional grants of power to Congress, even in the face of federalism attacks. *See, e.g.,* *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding, in a unanimous opinion written by then-Justice Rehnquist, that Fourteenth Amendment enforcement power allowed Congress to abrogate state's Eleventh Amendment immunity and to permit state to be sued directly for retrospective damages); *City of Rome v. U.S.*, 446 U.S. 156 (1980) (upholding amendments of Voting Rights Act of 1965, based on Fifteenth Amendment enforcement power that required federal preclearance of electoral changes that need not violate the Constitution). Even the decision in the *Civil Rights Cases* acknowledged more congressional power than *Boerne* appears to recognize.

⁶⁷ The Civil Rights Act of 1875 provided:

That all persons within the jurisdiction of the United States shall be entitled to the *full and equal* enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Civil Rights Act of 1875, 18 Stat. 335 (1875) (emphasis added).

reasoning of the *Civil Rights Cases* about Congress' Section 5 power "has not been questioned."⁶⁸

This remarkable assertion poses an important further question: not questioned by whom? Does questioning by anyone other than the Justices of the Court qualify? In their defensiveness about *Smith* and their haste to establish judicial exclusivity, the Justices apparently simply missed broad societal refutation of the *Civil Rights Cases* through statutes as well as in more general ways. Many Americans have had and still do have serious questions about what the Court said and did when it failed to allow Congress to reach "unjust discrimination" in the *Civil Rights Cases*:

If the laws themselves make any unjust discrimination, amenable to the prohibitions of the 14th Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it. When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of mere citizen, and ceases to be a special favorite of the laws.⁶⁹

According to the *Civil Rights Cases*, the time for formal equality had already arrived eighteen years after the end of slavery. By 1883, it was high time for former slaves to stop looking for federal protection. "It would be running the slavery argument into the ground," said the Court, to allow Congress's constitutional enforcement power to apply to the denial of access to places of public accommodation on the basis of race.⁷⁰

To be sure, the question of what the limits ought to be when Congress invokes its enforcement power has long been nettlesome. But the *Boerne*

⁶⁸ *City of Boerne*, 521 U.S. at 525.

⁶⁹ The *Civil Rights Cases*, 109 U.S. 3, 25 (1883). For the 8-1 majority, Justice Bradley went on to argue that before the abolition of slavery, "no one, at that time, thought" that the denial of "all the privileges enjoyed by white citizens" or being "subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement" might be "any invasion of their personal status as freemen." *Id.* at 31-32. That the majority was wrong as a matter of the law is demonstrated in Joseph Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996). But a careful reading of the *Civil Rights Cases* in its entirety reveals how chilling it is that the *Boerne* Court borrowed from and invoked the "not questioned" trope in the context of the *Civil Rights Cases*. In doing so, the Court performs its own utterance – it directly echoes the *Civil Rights Cases* decision and blatantly ignores what has been widely regarded as societal progress in the realm of racial discrimination since 1883, including the guarantee against racial discrimination in access to places of public accommodations in the 1964 Civil Rights Act, 42 U.S.C.A. § 2000a. Indeed the 1964 Civil Rights Act itself – and the need to stretch to find a Commerce Clause basis because of the *Civil Rights Cases* precedent – might properly be viewed as seriously questioning the *Civil Rights Cases* reasoning and holding, if one is willing to look up briefly from the pages of the U.S. Reports.

⁷⁰ *Civil Rights Cases*, 109 U.S. at 24.

Court's egregious use of the *Civil Rights Cases* as its key precedent, and the insistent exclusivity of its proclamation about constitutional wisdom – and constitutional jurisdiction, for that matter – are striking attempts to knock most of the pieces off the board. The holding in *Boerne* seems to go far beyond the demands of the case actually before the Court and to extend well past issues of religious freedom. Instead of recognizing the Court's own complicity in aiding Jim Crow by eviscerating a broad range of protections that Congress sought to provide in the decade after the Civil War, the *Boerne* Court may have struck an even greater blow against the protection of rights by fundamentally and broadly constricting Congress' protective power, granted explicitly by the Enforcement Clauses of the three Reconstruction Amendments.⁷¹

*B. "The States' traditional prerogatives"*⁷²

In the name of states' rights within the interminable federalism debate, the current Court has cut back vigorously on the power of Congress and other federal sources to limit state authority. That campaign advanced significantly in several decisions handed down the same week as *Boerne*.⁷³ Indeed, it is clear that a major element of the Court's objection to RFRA was the Justices' sense of too much intrusion by Congress into matters best left to state authorities. They reasoned, for example, that: "[t]he substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."⁷⁴

This quasi-legislative judicial balancing is surprising in itself. It seems even more surprisingly subjective when one recognizes that the absence of a pattern or practice under the Free Exercise Clause, as interpreted in *Smith*, must be

⁷¹ The *Boerne* majority acknowledged that "the specific holdings of these early cases [several decisions between 1875 and 1903 that narrowed or invalidated civil rights guarantees] might have been superseded or modified," yet Justice Kennedy insisted that "their treatment of Congress' Sec. 5 power as corrective or preventive, not definitional, has not been questioned." *City of Boerne*, 521 U.S. at 525. It thus remains the Court's own murky business, of course, to define what is in fact an unconstitutional definitional power, as compared to constitutionally more tolerable corrective or preventive congressional efforts.

⁷² *Id.* at 534.

⁷³ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (invalidating provisions of Brady Handgun Violence Prevention Act as unconstitutional commandeering of state officials by requiring them to perform background checks of prospective handgun purchasers); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (distinguishing doctrine of *Ex parte Young*, 209 U.S. 1234 (1908) and holding that the Eleventh Amendment implicitly barred declaratory and injunctive action by a tribe alleging ownership of state lands).

⁷⁴ *City of Boerne*, 521 U.S. at 534.

based on a very small sample indeed, given the very brief time between *Smith*'s radical doctrinal departure and the passage of RFRA. Moreover, the Court's lack of concern for those who suffer from unconstitutional conduct that affects their religious practices, combined with the solicitude it expresses for state and local regulatory interests such as zoning, contrasts starkly with the Court's recent substantial constitutional concern for even *de minimis* intrusions on property rights through zoning and other forms of state and local regulation.⁷⁵ Finally, the *Boerne* Court was so eager to repel "a congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens" that it gave no indication whatsoever as to whether RFRA's coverage of federal governmental entities was valid or not.⁷⁶

Contemporary federalism claims almost surely would have greatly surprised supporters of the 1866 Civil Rights Act and the Fourteenth Amendment. Deference to the states was hardly the lesson that the Radical Republicans – and the Moderates allied with them largely through President Johnson's blunders – drew from a gruesome war fought in large measure exactly to defeat states' rights claims.⁷⁷ Whether there is much precision possible in the *Boerne* concept of "traditional general regulatory power" of the states, or in the more basic idea of federalism as a constitutional standard proclaimed by the current Court are issues that are much debated today and beyond the scope of this essay.

By focusing briefly on the issue of perspective in a small sampling of recent Religion Clause cases, however, we can discern the crucial, vexing issues of judicial role and suitable detachment. Justice O'Connor led the way in recent years in directly discussing the importance of perspective within the larger problem of religious and secular coexistence in our society. "Because of this coexistence," she stated in one of her first opinions construing the Religion Clauses, "it is inevitable that the secular interests of government and the

⁷⁵ See, e.g., *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁷⁶ *City of Boerne*, 521 U.S. at 534. This omission may be simple sloppiness, or it may be an effort implicitly to leave the federal reach of RFRA in place. It is peculiar that the Court did not even drop a footnote to explain whether or not the majority meant to imply anything about the issue. See Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

⁷⁷ "The first constitutional problem encountered by Reconstruction had been the need to give the national government as a whole powers which had been exercised by the States; the second was to assert the right of the legislative branch within the national government." BROCK, *supra* note 57, at 254.

religious interests of various sects and their adherents will frequently intersect, conflict, and combine.”⁷⁸

Through emphasizing the importance of social context, O'Connor has developed an approach that would “preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”⁷⁹ In part, this approach incorporates an important recognition of what effects apparent state endorsement may have on those who are dissenters, skeptics, or simply losers in the many political battles interlarded with religious issues.⁸⁰

For Justice Scalia, by contrast, there should be little – if any – judicial second-guessing of how matters affecting religion are resolved by *state or local* authorities. Scalia may believe that the opposite is true regarding the judgments of elected *federal* officials. According to Scalia, the issue is “quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of these concrete cases.”⁸¹ With vigor, Scalia asserts that *Smith* already has answered: “[i]t shall be the people.”⁸²

There is no template, of course, to fit over the multitude of complex disputes about federalism, particularly when they are commingled with sorting out basic Religion Clause tensions in the “crucible of litigation.” This is the case even if one were still to agree that “the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”⁸³ But the question of whether anyone will comprehend and fully protect the rights of minority religions, fringe beliefs, and doubters has become much more pressing after *Smith* and *Boerne*.

In earlier cases, it often seemed possible to map the votes of the Justices by concentrating on whose perspective in the litigation they adopted or found

⁷⁸ *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

⁷⁹ *Id.* at 70 (O'Connor, J., concurring). Justice O'Connor argued that courts are obliged to examine whether “government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement.” *Id.* at 69 (O'Connor, J., concurring). The bitter debate within the Court about both the purpose and the effect of Alabama’s moment of silence and voluntary prayer statutes, however, suggests how difficult the role of “objective observer” may be in the context of the coexistence and conflict of secular and religious interests at the state level. *See id.* at 76 (O'Connor, J., concurring).

⁸⁰ Prayer in the schools caused heated controversy in the nineteenth century as well. *See, e.g.,* DONALD E. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* (1965); Charles Fairman, *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States*, in 6 *RECONSTRUCTION AND REUNION 1864-1888* 1310-16 (1971); CHARLES MORRIS, *AMERICAN CATHOLIC* (1997); *cf. Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998) (upholding Milwaukee tuition voucher plan).

⁸¹ *City of Boerne*, 521 U.S. at 544 (Scalia, J., with Stevens, J., concurring in part).

⁸² *Id.* (Scalia, J., with Stevens, J., concurring in part).

⁸³ *Wallace*, 472 U.S. at 53 (1985) (Stevens, J., for the majority).

worthy of empathy. Justice Stevens for the majority in *Wallace v. Jaffree*, for example, expressed concern for the views of nonbelievers and those who feel silently coerced, while Justice O'Connor was drawn to the role of "objective observer." On the other hand, Chief Justice Burger wholeheartedly identified with the Alabama authorities and embraced their argument that the statute under review "affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect," while his fellow dissenter, Justice Rehnquist, argued primarily from a critical history of the "wall of separation" metaphor that he took to be obvious to "any detached observer."⁸⁴

The significance of perspective is particularly acute in the context of legal scrutiny of religious matters. Chief Justice Burger may have been blustering a bit, but he had a point. A position of neutrality concerning religion is indeed hard to establish and hard to maintain both legally and personally.⁸⁵ We all make our own arrangements regarding religion, volitional or not.⁸⁶ Moreover, because religious issues are exceptionally sensitive, multilayered, and elusive to outside observers, the paradigmatic judicial role of objectivity and/or detachment becomes particularly difficult to identify or to maintain.⁸⁷

Perhaps because issues of law and religion are so complicated, and so personally charged, the current Court seeks to establish some lower common denominators. *Boerne* makes it clear that a majority of the Justices believe that formal voting equality within state and local political processes affords

⁸⁴ *Id.* at 53-54, 76, 83, 89, 92. Thus, for Justice O'Connor, "[t]he solution to the conflict between Religion Clauses lies not in 'neutrality,' but rather in identifying workable limits to the government's license to promote the free exercise of religion." *Id.* at 83 (O'Connor, J., concurring). Whereas, for Chief Justice Burger:

[i]f the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the 'benevolent neutrality' that we have long considered the correct constitutional standard will quickly translate into the 'callous indifference' that the Court has consistently held the Establishment Clause does not require.

Id. at 90 (Burger, C.J., dissenting). Justice Powell concurred separately, primarily to urge retention of the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), test, and Justice White dissented separately, primarily to repeat his call for basic reconsideration of the Court's precedents dealing with the Religion Clauses.

⁸⁵ See Laycock, *supra* note 2.

⁸⁶ See Williams & Williams, *supra* note 2.

⁸⁷ Shortly before he was murdered, along with five other Jesuits and their housekeeper and her daughter in El Salvador in 1989, Father Ignacio Martín-Baró explained:

Objectivity is not the same as impartiality with regard to the processes that necessarily affect all of us. Thus, for an objective psychosocial analysis it is more useful to become conscious of one's own involvements and interests than to deny them and try to place oneself on a fictitious higher plane "beyond good and evil."

Religion as an Instrument of Psychological Warfare, in Ignacio Martín-Baró, WRITINGS FOR A LIBERATION PSYCHOLOGY 149-50 (Adrianne Aron & Shawn Corne eds., 1994). See also SOIFER, *supra* note 51, at 150-81.

sufficient protection for free consciences. If, but only if, the popular will is so blatantly biased as to adopt a "religious gerrymander"⁸⁸ – as the City of Hialeah was held to have done in *Lukumi* – will the Court allow federal judicial intervention. Absent overt gerrymandering based on religion, state politics as usual must prevail. In the name of deference to the proper authority of the states, therefore, there ought to be no special constitutional solicitude, no particular concern to shield dissenters, and no obligation to protect the politically vulnerable from "intolerance of the disbeliever and the uncertain."⁸⁹ There seems great haste to get the job done, to have at last "paved paradise & put up a parking lot."⁹⁰

C. "The Essential Autonomy of Religious Life"⁹¹

By contrast to the ebb and flow of the jurisdictional aspects of federalism, the autonomy of religious bodies in ecclesiastical matters has been well established as a federal matter for over a century. Faced with one of the multitude of disputes that arose in the era of the Civil War over who controlled a particular church, the United States Supreme Court held as early as 1871 that:

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding on them, in their application to the case before them.⁹²

⁸⁸ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (discussed *supra* note 6).

⁸⁹ *Wallace*, 472 U.S. at 54.

⁹⁰ Joni Mitchell, *Big Yellow Taxi*, in *RISE UP SINGING* (Peter Blood & Annie Patterson eds., 1992).

⁹¹ *Marsh v. Chambers*, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting).

⁹² *Watson v. Jones*, 80 U.S. 679, 726 (1871) (rejecting implied trust judicial review and instead deferring to General Assembly of Presbyterian Church that had awarded Walnut Street Church in Louisville, Kentucky to antislavery faction). The *Watson* decision was not based on constitutional law, but rather was within the Court's common law review power at the time. *Watson* was followed and transformed into a federal constitutional rule in subsequent decisions. See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese of Am. & Canada v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952). State courts had established the principle of deference to ecclesiastical jurisdiction earlier, though not without great struggles, for example, as they faced bitter disputes over church control and property between Congregationalists and Unitarians. This extended controversy helped induce the gradual disestablishment of religion under state law, a movement that had reached even Massachusetts by 1833. See, e.g., *The Unitarian Controversy*, in LEONARD LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 29-42 (1957).

In *Watson v. Jones*, the Court recognized the far-reaching importance and practical impact of conceding such exclusive and final authority to church bodies. Indeed, Justice Miller, writing for the majority, somewhat wistfully noted that the dispute involved a jurisdictional issue, but he then added, “[t]here is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application.”⁹³ Nonetheless, the Court held that deference to religious authority was inescapable because “[i]n this country the *full and free* right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.”⁹⁴

The *Watson* Court’s statement of broad deference to the jurisdiction of religious groups was fenced round with caveats, to be sure, ranging from the limits anchored in what judges might discern as problems of morality, property, and personal rights to the Court’s proclaimed ultimate judicial control over what constitutes an ecclesiastical matter, properly understood.⁹⁵ It is in the nature of jurisdictional disputes, in fact, to be partly about power, partly about relative autonomy – but nearly always about the interpretation of authority on a continuum. This problem of overlapping jurisdictions seems to frustrate the Court today, particularly as a majority seems to be committed to the discovery of settled and easily discerned either/or principles.

The current Court’s discomfort with the jurisdictional tension at the heart of the Religion Clauses has led a majority to stir free exercise claims into a pabulum of unexamined general, neutral rules. Such discomfort also may help explain why the Justices appear so inclined to castigate those who litigate at the crossroads of law and religion. Paradoxically, some of the same Justices who declare themselves anxious to reduce what they take to be the excessive separation of church and state, simultaneously reject free exercise arguments by maintaining that these religious claims conflict with the special needs of the military, for example, or the strictly internal affairs of the social security bureaucracy.⁹⁶

⁹³ *Watson*, 80 U.S. at 732.

⁹⁴ *Id.* at 728 (emphasis added).

⁹⁵ All these possible limits, in fact, help explain how the “elementary dear *Watson*” principle has found an apparently secure home in American jurisprudence.

⁹⁶ See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (Rehnquist, J.) (proclaiming great deference to the military’s professional judgment regarding military interest “within military community”); *Bowen v. Roy*, 476 U.S. 693, 712 (1986) (Burger, C.J.) (emphasizing need to leave “sufficient operating latitude” to government entities).

Nancy Rosenblum has pointed out substantial dangers looming within the potential imperialism of "sacred space."⁹⁷ On the other hand, secular authority has a strong "jurispathic" tendency, as Robert Cover explained, which continuously challenges our nation's "breathtaking acknowledgment of the privilege of insular autonomy for all sorts of groups and associations."⁹⁸ Jurisdictional tension enlivens some of the best recent scholarship about groups, particularly the developing focus on the remarkably diverse capacity to create meaning. Such creativity often is accomplished by individuals and groups who operate largely in realms quite apart from the state.⁹⁹

V. CONCLUSION: ALTERNATIVE HISTORIES

The core problem in the constitutional jurisprudence of law and religion may be that in the United States there is not now, nor has there ever been, a clear way to identify or to cabin the essential autonomy of religious life. It is uncommonly easy in the realm of religion, in fact, to identify exceptions and limitations. Thus there is a tendency to argue from extreme examples of one slippery slope or another.¹⁰⁰ Perhaps for this very reason, it would be wise to heed the nuances of historical context, rather than to seek a simple originalist key to unlock some purported Framers' intent.

It should matter, for example, that Roger Williams believed strongly that "[t]he Christian magistrate could best advance the cause of his own religion by doing it no favors."¹⁰¹ But we should also be aware that for all his pathbreaking commitment to tolerance, Williams saw nothing wrong in disarming Catholics and making them wear distinctive clothes or in suppressing the "incivilities" of the Quakers, whom he detested – though he would not allow suppressing their modes of worship.¹⁰² Moreover, it is fitting that we attend to the kinetic quality of the relationship of law and religion

⁹⁷ ROSENBLUM, *supra* note 2, at 93 (discussing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) as a prime example).

⁹⁸ Robert Cover, *Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 60-62 (1983).

⁹⁹ See, e.g., ROSENBLUM, *supra* note 2; EVANS, *supra* note 2.

¹⁰⁰ A good example may be found in Justice Scalia's opinion for the Court in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990): "Any society adopting such a system would be courting anarchy, but the danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." *Id.* at 888. Professor Lupu points out, however: "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe." Lupu, *supra* note 2, at 947.

¹⁰¹ MORGAN, *supra* note 22, at 140.

¹⁰² See *id.* at 134.

across time, to say nothing of the current dramatic flux in religious identities within our nation.

Arguments from history do not compel outcomes. In fact, it often is striking how the same decision-makers can feel comfortable in gliding back and forth between levels of generality and the kinds of history they find compelling. For example, in the span of five years, the Supreme Court held both that it was unconstitutional for Tennessee to exclude ministers from holding public office and that it was constitutional for Nebraska's unicameral legislature to begin each session with a prayer in the Judeo-Christian tradition offered for sixteen straight years by a Presbyterian chaplain paid by the state. In both cases, Chief Justice Burger wrote the lead opinions, and he relied in both on America's historical experience. That experience, according to Burger, meant that Tennessee's position as the lone state to retain the once commonplace prohibition against ministers' service had to give way to a new tide and the lessons of time.¹⁰³ In the Nebraska decision, by contrast, Burger argued that it was crucial to recognize that: "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."¹⁰⁴ In an important sense, the use of history in these two decisions underscores the Court's tendency to embrace "winners' history" as if it were definitive.

What this approach misses, however, is the need for judges to hear and to understand the perspective of skeptics and dissenters who invoke the courts' jurisdiction as they seek to resist the majoritarian flood. From at least the time of Roger Williams, the history we celebrate has included refuge for those unable or unwilling to go along with the majority because of beliefs and practices anchored in their religious views, or even their lack of religious beliefs altogether.

We aspire to treat like cases alike. Simultaneously, however, Americans like to emphasize that every person is different from every other person. This helps to explain why the protection of full rights of conscience so often seems to be in direct tension with the protection of equal rights. To treat everyone the same is to miss critical contextual differences. These differences tend to matter a great deal when religion and freedom of conscience are directly at issue.

Despite the current Court's considerable enthusiasm to settle these difficult matters by flattening them into general rules or by stuffing them into

¹⁰³ See *McDaniel v. Paty*, 435 U.S. 618, 625 (1978). The Court was unanimous (Justice Blackmun did not participate), but for very different doctrinal reasons. Writing for the plurality, Burger relied on historical change over time rather than being bound by Framers' intent and the fact that a majority of the states had prohibitions parallel to Tennessee's at the time of the Constitution and throughout most of the nation's early history.

¹⁰⁴ *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

jurisdictional cubbyholes, one may take comfort from the very complexity and resilience of the matters in dispute. Chief Justice Rehnquist was correct when he paraphrased Mark DeWolfe Howe and insisted that “stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history.”¹⁰⁵

Fortunately – one might even say blessedly – our history seems to include enhanced general acceptance of a core belief that: “[o]ne’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”¹⁰⁶ Such rights still must be taken largely on faith and attended to outside the courtroom. But they remain key elements of an ongoing quest to make real a broad promise that: “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁰⁷

We have hardly begun to see the light about what might strike us as unorthodox. Though the force behind those who dare to differ may emanate from somewhere deep within our past, we have yet to guarantee the “full and equal rights of conscience.”¹⁰⁸

¹⁰⁵ *Wallace v. Jaffree*, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting).

¹⁰⁶ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (invalidating mandatory stiff-arm flag salute in public schools).

¹⁰⁷ *Id.* at 642. Even if there are no fixed stars – and despite the fact that the starlight we see is from very long ago – there is still something worth maintaining in the pursuit of lofty goals. This should include seeking to secure constitutional protection for dissenters, even those bold enough to exercise freedom of conscience and religion “fully and freely,” at least until they “manifestly endanger” clearly competing and very substantial governmental interests.

¹⁰⁸ James Madison’s proposed amendment to the U.S. Constitution in the First Congress in 1789, quoted and discussed *supra* notes 41–48 and accompanying text.